NOTES

CRIMINAL LAW

MANSLAUGHTER IN THE SECOND DEGREE

The defendant was indicted on a charge of second degree manslaughter, having killed the deceased while driving an automobile on a road located on the grounds of the Longview Hospital, a state institution for the care of the insane. The jury found the defendant guilty of driving while drunk and operating his car without due regard for the safety and rights of the pedestrian. The case centered upon the question of whether the driveway was "a road or highway" within the second-degree manslaughter statute, Ohio Gen. Code Sec. 12404-1, 116 Ohio Laws 205. The Ohio Supreme Court held that the defendant was not guilty of a crime under the statute as the driveway was built, maintained and controlled by the hospital for its own use and the public having business therewith, and was never dedicated or legally accepted as a street, township road, county or state highway within the purview of the term, "roads or highways" as found in the statute. *State* v. *Root*, 132 Ohio St. 229, 6 N.E. (2d) 979 (1937), sustaining the Court of Appeals in 54 Ohio App. 412, 7 N.E. (2d) 664, 23 Ohio L. Abs. 136, 8 Ohio Op. 166 (1936).

The Supreme Court placed great emphasis on the fact that the General Assembly never granted permission to establish a "street, alley, or road" in the place where this driveway is located, as provided by the Ohio Gen. Code Sec. 23, which reads: "a street, alley, or road shall not be laid out or established through or over the lands belonging to a public institution of the state without the special permission of the general assembly."

The provisions of the Ohio Gen. Code Sec. 12401-1, under which the defendant was indicted, are as follows: "Whoever shall unlawfully and unintentionally kill another while engaged in the violation of any law of this state applying to the use or regulation of traffic on, over, or across *roads or highways* shall be guilty of manslaughter in the second degree * * *."

To make a person amenable to the statute quoted, it is necessary that the killing take place on a public road or highway. A highway has been defined as a way open to the public at large without distinction,

discrimination, or restriction, except such as is incident to regulations calculated ot secure to the general public the largest practical benefit therefrom and enjoyment thereof. *Macomber* v. *Nichols*, 34 Mich. 212, 22 Am. Rep. 522 (1876); *Omaha & Street R. Co.* v. *City of Omaha*, 114 Neb. 483, 208 N.W. 123 (1926); *White Oak Coal Co.* v. *City of Manchester*, 109 Va. 749, 132 Am. St. Rep. 943 (1909), 64 S.E. 944; *Bogue* v. *Bennett*, 156 Ind. 478, 83 Am. St. Rep. 212 60 N.E. 143, (1900); *Dietz* v. *C. & M. Valley Traction Co.*, 4 Ohio N.P. 399, 6 Ohio D.N.P. 513 (1897); *Sullivan* v. *Columbus*, 12 Ohio D.N.P. 651 (1902). Public highways are divided into three classes, namely: state roads, county roads, and township roads. Ohio Gen. Code Sec. 7464. The prime essentials of a highway are the right to common enjoyment on the one hand and the duty of public maintenance on the other hand. *Matter of Mayor, etc., of New York*, 135 N. Y. 253, 31 N.E. 1043 (1892); 13 R.C.L. page 14. But, it has been held that a road, established by public authority, is a public road even though it is to be maintained at the expense of private individuals, so long as the right to use the same is open to the general public. *Shaver* v. *Starrett*, 4 Ohio St. 494 (1855).

If a road is maintained at private expense for the benefit of particular individuals, it is a private road or way. *Kister* v. *Reeser*, 98 Pa. St. 1, 42 Am. Rep. 608 (1881); *St. Louis & S. F. Ry. Co.* v. *Smith*, 41 Okl. 163, 137 Pac. 714, 715 (1913); see 21 R.C.L., pages 1205-1257 on "Private Ways"; see 13 R.C.L., page 16 for the distinction between a highway and a private road or way. It is the right to travel by all the world, and not the actual exercise of the right, which constitutes a way a public highway. *St. Louis & S. F. Ry. Co.* v. *Smith*, *supra*; Matter of Mayor, etc. of New York, *supra*. Thus, if it is open to all, a way is a public highway even though it may accommodate only a limited portion of the public or even a single family. *Fanning* v. *Gilliland*, 37 Ore. 369, 61 Pac. 636 (1900); *Law* v. *Neola Elevator Co.*, 281 Ill. 143, 117 N.E. 435 (1917).

A public highway includes a *cul-de-sac* (a passage or place with only one outlet such as a blind alley or dead end street). *Law v. Neola Elevator Co.*, *supra*; *Carlin* v. *Chicago*, 262 Ill. 564, 104 N.E. 905 (1914); *Sheaf* v. *People*, 87 Ill. 189, 29 Am. Rep. 49 (1877); *Schatz* v. *Pfeil*, 56 Wis. 429, 14 N.W. 628 (1883). *Contra*, *People* v. *Jackson*, 7 Mich. 432, 74 Am. Dec. 729 (1859). Streets of a town or city are public highways. *Morris* v. *Bowers*, Wright (Ohio report) 749 (1834); *Youngstown* v. *Pittsburgh & W. R. Co.*, 3 Ohio C.C. 214, 2 Ohio C.D. 121 (1888); *Parker* v. *City of Silverton*, 109 Ore. 298, 220

Pac. 139 (1923); *Richmonds F. & P. R. Co.* v. *City of Richmond*, 145 Va. 225, 133 S.E. 800 (1926); *Burns* v. *Kendall*, 96 S. Car. 385, 80 S.E. 621 (1913); *Schier* v. *State of Ohio*, 96 Ohio St. 245, 117 N.E. 229 (1917). Generically the term, "street" includes sidewarks. *Gridley* v. *Bloomington*, 88 Ill. 554, 30 Am. Rep. 566 (1878); *Chicago, etc., R. Co.* v. *Redding*, 124 Ark. 368, 187 S.W. 651 (1916); *People* v. *Chamberis*, 297 Ill. 455, 130 N.E. 712 (1921); *Noonan* v. *Stillwater*, 33 Minn. 198, 22 N.W. 444 (1885). In fact, it may embrace all that portion of a street from the building line to the curbing, including grass plats or parking between the walk proper and the curbing. *Woodson* v. *Metropolitan St. R. Co.*, 224 Mo. 685, 123 S.W. 820 (1909). An alley laid out and established by public authority is a public highway. *State* v. *City of Montevideo*, 142 Minn. 157, 171 N.W. 314, 316 (1919); *O'Brien* v. *Burroughs Adding Mach. Co.*, 191 Mo. App. 501, 177 S.W. 811 (1915); *Osage City* v. *Larkin*, 40 Kan. 206, 19 Pac. 658 (1888); *Ferguson* v. *Yakima*, 139 Wash. 216, 246 Pac. 287, 48 A.L.R. 431 (1926). A bridge erected for public travel and accommodation is a public highway. *Point Bridge Co.* v. *Pittsburgh Rys. Co.*, 240 Pa. 105, 87 Atl. 614, 615 (1913); *City of Baraboo* v. *Dwyer*, 166 Wis. 372, 165 N.W. 297, 299 (1917); *Carlin* v. *Chicago, supra.*

The unintentional killing of another by gross negligence in the doing of a lawful act is manslaughtere at common law. Clark and Marshall, Crimes, 3rd Ed., Sec. 264 (1927); *Reg.* v. *Salmon*, 14 Cox Cr C. 494 (1880); *Knight's case*, v *Lewin* Cr. C. 168 (1828). Thus, if a person is guilty of gross negligence in driving which results in killing another, he is guilty of manslaughter at common law. *Reg.* v. *Swindall*, 2 Car. & K. 230, 2 Cox Cr. C. 14 (1846); *Reg.* v. *Longbottom*, 3 Cox Cr. C. 439 (1849); *White* v. *State*, 84 Ala. 421, 4 So. 598 (1887); *People* v. *Falkovitch*, 280 Ill. 321, 117 N.E. 398 (1917); *Smith* v. *State*, 126 Ind. 252, 115 N.E. 943 (1917); *Comm.* v. *Guillemette*, 243 Mass. 346, 137 N.E. 700 (1923). It is settled that there are no common law crimes in Ohio. *Vanvalkenburg* v *State of Ohio*, 11 Ohio 405 (1842); *Sutcliffe* v. *State*, 18 Ohio 469, 51 Am. Dec. 459 (1849); *State* v. *Rose*, 89 Ohio St. 383, 386, 106 N.E. 50 (1914); *State* v. *Hearn*, 115 Ohio St. 340, 343, 154 N.E. 244 (1926). Therefore, unlike manslaughter at common law, the Ohio conception does not recognize "gross" or "criminal" negligence as a basis for a manslaughter charge in the first or second degree unless a statute makes such act of negligence a criminal offense. 21 Ohio Jur. Homicides, Secs. 22 and 27; *Johnson* v. *State*, 66 Ohio St. 59, 90 Am.

St. Rep. 564, 61 L.R.A. 277, 63 N.E. 607 (1902); *Martin* v. *State*, 70 Ohio St. 219, 71 N.E. 640 (1904). Nor is there a statute in Ohio making gross negligence an unlawful act. Such a serious hiatus has enabled persons to avoid criminal punishment though their acts were highly dangerous to the public. Thus, in the case at bar, if the defendant were guilty of gross negligence in killing a person on a private road or driveway, or even on a public highway, he would not be liable unless the particular act he did was illegal by statute. The Ohio legislature is the only body that can remedy the aforestated hiatus, and there would seem to be good reason for it so doing.

In the principal cast the evidence definitely showed that the driveway was not only open to all the public but also maintained at public expense. Therefore, in the light of the preceding discussion, the driveway, in the case at bar, fits into the definition of a public road or highway. The fact that the General Assembly had not as yet granted a special permission, under Sec. 23 of the Ohio Gen. Code, for a road does not make the way any the less a public road for the purpose of the manslaughter statute. The defendance was found guilty by the jury, of drunken driving and driving without due regard for public safety, thus, violating the Ohio Gen. Code Secs. 12603-1 and 12628-1. Therefore, the Supreme Court, it seems, could reasonably have held the defendant amenable to the second-degree manslaughter statute.

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WHAT ARE GAMES OF CHANCE AND LOTTERIES?

The plaintiff corporation claims to have conceived and is now operating short range shooting galleries in which the player pays ten cents and is allowed three shots with a regulation .22 calibre rifle and attempts to obliterate one of four small red figure "5"s printed in each corner of a small rectangular white card target. If a player succeeds in obliterating one of the figures, he is awarded the "Jack Pot," a fund consisting of five dollars put up by the operators and increased by ten cents every time all four of the figures have been shot at. It is alleged that the defendants are operating galleries similar in every way to the plaintiff's except for the target, which in the defendants' galleries are diamond shaped and marked with the letter "J"; and the name, "Jack Pot Galleries." The plaintiff seeks to enjoin the defendants from carrying on this line of business which is alleged to be in unfair trade competition with the plaintiff's galleries. The chief defense is a frank claim that the business of both parties violates the gaming laws and is therefore illegal and that a